

## The Honorable Robert S. Lasnik

IN THE UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON

JACK MACKIE, an individual,  Plaintiff,  vs.  MICHAEL J. HIPPLE, an individual; AGE FOTOSTOCK AMERICA, INC., a Delaware Corporation; and PUBLITEK, INC. dba FOTOSEARCH LLC, a Wisconsin Corporation,  Defendants.	No. 09-00164-RSL  PLAINTIFF'S OPPOSITION TO MOTION TO DISMISS
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#### A. Introduction; facts

Defendant misrepresents our Complaint and adds facts of unknown origin.

The Complaint, and its attachments, describe Mr. Mackie's creation of the Dance Steps on Broadway, its nature as a collection of eight fanciful groups of bronzed numbered shoes and directional arrows embedded in separate sites along Broadway Avenue. Each of the eight clusters reflects dancers engaged in some real or imagined dance and is accompanied with a plaque bearing both the name of the dance and a copyright notice.

When given the opportunity to do so, Mr. Mackie will describe his artistic process and the over-all success of his work. Suffice it to say now that his process and work is not

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1 recognizable in Defendant's various put-downs.

2 Mackie applied for an received copyright registration. A copy is attached to the  
3 Complaint.

4 Each dance step cluster is defined by the Complaint, simply for convenience, as a  
5 Sub-installation. That for the Mambo folk form is alleged to have been used by Defendant,  
6 without authority, as the subject of a commercial photograph which he later offered for  
7 sale to the public through the offices of his co-defendants. Copies of the co-defendants'  
8 web pages in which the photo at issue is distributed are attached to the Complaint. The  
9 Complaint asserts that one can recognize the Mambo Sub-installation in the photo.

10 Defendant took the liberty of adding to his motion a larger version of the offending  
11 photo. We respond by providing a photo of the Mambo Sub-installation and a publicly  
12 available description of the etiology of the Mambo. A comparison of the photos shows that  
13 the infringing one was taken from the top or at least vicinity of the copyright notice. In  
14 passages of this motion (which were identified by us in response to Defendants recent  
15 motion to stay discovery etc.), and in the recently completed Joint Statement<sup>1</sup>, Defendant  
concedes that the photo is of the Mambo sub-installation.

16 **B. Argument**

17 Defendant correctly states the standard for judging the sufficiency of complaints  
18 but badly exaggerates its application; none of his cases stand for the proposition that  
19 Rule12b6 properly applies to those elements on which his motion focuses.

20 **1. General standard for sufficiency of Complaint**

21 As the motion argues at 3/9 - 23 (*citing Twombly, Robertson, and Sadler*), the  
22 standard for Rule 12(b)(6) motions is whether the attacked complaint identifies some

23  
24 <sup>1</sup> This is a copyright infringement case concerning a photograph by Defendant Hipple, a  
professional photographer, which includes a portion of a sculpture by Plaintiff Mackie, a  
25 professional artist and designer.

fact(s) upon which it is reasonably possible to infer plaintiff's eventual satisfaction of the elements of a cause of action. A plaintiff may not rely simply on formulaic legal terminology. The *Twombly* Court, for example, found an anti-trust complaint insufficient where, for the necessary "collusion" element, the plaintiff said only that it *believed there was on based on the fact that all competitors behaved in a parallel, non-competitive fashion.* This ran afoul of the obligation to at least suggest knowledge of sufficient facts because parallel activity specifically is not prohibited. This, however, is not intended to supplant modern liberal pleading rules.

Defendant summarizes those complaints which fail as "specious" propositions; that, then, is a negative way of expressing this standard. (Motion, 3/9)

This standard, as even Defendant's cases make clear, still is not intended to substitute code pleading for modern notice pleading rules, *see Bell Atlantic v. Twombly*, 440 U.S. 544, 555 (2007) (*citing* the language of Fed. R. Civ. P. 8(a)(2): "short and plain statement of the claim, showing that the pleader is entitled to relief"), or standards for review under Fed. R. Civ. P. 12(b)(6), *see Sadler v. State Farm*, 2007 WL 2778257 at \* 1, (court assumes the truth of all allegations and also all reasonable inferences to be drawn from them; it is not necessary for plaintiff to plead details). *See also FragrancNet.com v. FragranceX.com*, \_\_ F. Supp. \_\_, 2010 WL 174159 (E.D.N.Y. January 14, 2010) and *Carter v. Hubert*, 2008 WL 2598734 (MD.La., 2008).<sup>2</sup>

Cases (again, including his of *Sadler* and *Robertson*) also are not as draconian as the motion in terms of result; generally the plaintiff is offered a chance to amend

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<sup>2</sup> The latter two say that factual detail is not required in a complaint in order to satisfy 12(b)(6) and, rather, trial proof can be anything consistent with the legal and factual outline of the complaint.

1           **2. Improper (and otherwise wrong) attempt to apply pleading standard to**  
 2 **issue of whether junior use is “substantially similar” to senior use**

3           **2.1 Damage**

4           Defendant is critical of Mr. Mackie for pleading copyright infringement without,  
 5 Defendant says, specificity concerning “damage.” (Motion 3/13). He provides no  
 6 authority for the notion that the above-referenced pleading standards requires anything  
 7 more than facts stating or inferring infringement. The reason for this absence is that  
 8 financial damage to the copyright holder is inherent in the infringement of his/her  
 9 copyright—and he/she is entitled to equitable and financial relief. To establish  
 10 infringement, two elements must be proven: (1) ownership of a valid copyright, and (2)  
 11 copying of constituent elements of the work that are original. *Feist Publ'ns, Inc. v.*  
 12 *Rural Tel. Serv. Co.*, 499 U.S. 340, 361 (1991). Indeed, the pleading rules say  
 13 allegations of damages *are not* necessary: after the above-quoted language concerning  
 14 the provision of a “short and plain” statement of claim, Rule 8 goes on to say simply that  
 15 the Plaintiff include a “demand for the relief sought.”

16           Mr. Mackie’s complaint alleges that the co-defendant electronic photograph stock  
 17 catalogs, under contract with Defendant, distributed for sale copies of Defendant’s  
 18 photograph (with its unauthorized copies of Mr. Mackie’s work).<sup>3</sup> This should be a  
 19 more than sufficient statement that Mackie’s protection against unauthorized use  
 20 (including making and distributing derivative works 17 U.S.C. § 101) has been infringed

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22  
 23           <sup>3</sup> One relevant passage of the Complaint says that “Hipple unilaterally used the image  
 24 of the Sub-installation in a piece of graphic art . . . [and] provided . . . [it] for use by [co-  
 25 defendants] knowing that the images were to be provided for purchase by customers of . . . [co-  
 defendants] on their webpages. The subject Sub-installation is plainly recognizable in  
 [Hipple’s photo].” Complaint ¶ 12.

1 and Defendant is one of the responsible parties. *Axelrod v. Simon & Schuster*, 24 WL  
 2 2412257 (S.D.N.Y. 2007) (allegation that one defendant sold no-longer-licensed copies  
 3 to third parties with knowledge that they would continue distribution is sufficient for  
 4 pleading of contributory or vicarious infringement).

## 5       **2.2 Substantial similarity**

6       Defendant insists that Mr. Mackie needed to plead his specific *circumstantial*  
 7 proof of copying. (4/7) Appropriate circumstantial proof that the similar appearance of  
 8 the junior use is not mere coincidence consists of demonstration that the alleged  
 9 infringer had access to the senior use and the junior use is so similar as to demonstrate  
 10 its relationship with the senior use. *Krofft Television Productions v. McDonald's Corp.*,  
 11 562 F. 2d 1157, 1164 (9<sup>th</sup> Cir. 1977). The test has two phases ("extrinsic" and  
 12 "intrinsic"). *Id.* While both are based on facts, the first (which depends upon a  
 13 comparison of technical qualities like themes, materials, subject matter and setting)  
 14 might be resolved on summary judgment. *Id.* The "intrinsic" test then centers on the  
 15 response of ordinary people as to whether the junior use repeated the senior uses'  
 16 concept and feel. *Id.* The extrinsic test might require resolution by a finder of fact  
 17 based on over-all impression; the intrinsic test always does. *Id.*

18       Defendant's own authority (*Funky Films v. Time Warner*, 462 F. 3d 1072, 1076  
 19 (9<sup>th</sup> Cir. 2006) and *Three Boys Music v. Bolton*, 212 F. 3d 477, 481 (9<sup>th</sup> Cir. 2000)) says  
 20 that the test for circumstantial evidence is irrelevant in cases (as this one) of direct  
 21 evidence of copying. Plaintiff need not prove copying circumstantially if he/she can  
 22 prove it directly. *Accord, Kunycia v. Melville Realty Co.*, 755 F.Supp.566, 575  
 23 (E.D.Mich. 2008). The present case, after all, is about a photograph of a copyrighted  
 24

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1 sculpture rather than a copy-cat sculpture. This is the reason why circumstantial proof  
2 subject is missing from cases like *Feist v. Rural Telephone*, 399 U.S. 340 (1991); the  
3 defendant conceded copying but contested copyright protection of the original.

4 Even where circumstantial evidence is needed to prove that defendant infringed,  
5 whether the victim sufficiently proves that is a question of fact, not pleading  
6 requirements. None of defendant's cases are about the sufficiency of a complaint to  
7 outline the details of his/her proposed proof of similarity; all of them are the results,  
8 rather, of hearings on the facts. *Funky Films v. Time Warner*, 462 F.3d 1072 (9<sup>th</sup> Cir.  
9 2006) is a summary judgment decision said require detailed examination of the senior  
10 and junior works. It also characterizes all aspects of the circumstantial evidence tests as  
11 "fact-based." *Three Boys* resolved the issue of substantial similarity only by jury trial.  
12 It discussed, at 485, the needed (or normal) utilization of expert witnesses in part of the  
13 analysis. *Kouf v. Walt Disney Pictures*, 16 F. 3d 1042 (1994) was decided on summary  
14 judgment. *Frybarger v. IBM Corp.*, 812 F. 2d 525 (9<sup>th</sup> Cir. 1987) was resolved on  
15 summary judgment. *Krofft* was decided by a jury. *See also, Cavalier v. Random House*,  
16 297 F. 3d 815 (9<sup>th</sup> Cir 2002) (applying extrinsic test to facts presented in summary  
17 judgment without reference to the detail of allegations in the complaint other than that it  
18 alleged that defendant published books virtually identical to plaintiff's).  
19

20 The proper test where the defendant claims that the amount actually copied is a  
21 trifling is the so-called "de minimus" test. *See, Newton v. Diamond*, 388 F. 3d 1189 (9<sup>th</sup>  
22 Cir. 2004) (also cited by Defendant). The *Newton* Court said that its test was similar in  
23 scope and fact-intensity to the "intrinsic" phase of the test for circumstantial proof: an  
24 audience of average viewers defines whether a relationship between junior and senior  
25

1 uses is evident. Further, a very small amount of copying can still be infringing. For  
 2 instance, in *Harper & Row Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539, 105 S.  
 3 Ct. 2218, 85 L. Ed. 2d 588 (1985), the copying of 300 words from an unpublished  
 4 manuscript of 200,000 words was held to be infringing.

5       **3. Extrapolation of pleading standards to substantive requirements for**  
 6 **copyrightability of senior use**

7       In one half of the motion defendant presumes to use Rule 12(b)(6) to debate the  
 8 substantive legitimacy of Mr. Mackie's copyright, claiming it lacks sufficient creativity  
 9 (8/3) and/or is about (1) merely a procedure (7/8) or (2) merely a utilitarian object  
 10 (9/14). None of his cases say that Rule 12(b)(6) is the proper vehicle for a motion; all  
 11 emphasize the fact-intensive nature of the necessary analysis and were decided on  
 12 summary judgment or trial on the merits.

13       Fairly considered, there also is nothing in Defendant's various arguments  
 14 foretells of eventual success.

15       **3.1 Challenge to the creativity of Mr. Mackie's work**

16       Defendant dismisses Mackie's work as a merely a bunch of shoe prints, numbers  
 17 and directional arrows, all of which (he says) are simplistic and, worse, themselves  
 18 copied. (Motion, 8/3).

19       **3.1.1 Inappropriate for resolution under Rule 12(b)(6)**

20       Creativity is inherently a factual question and, thus, not one resolvable in a Rule  
 21 12(b)(6) motion. *FragranceNet.com v. FragranceX.com*, \_\_\_ F. Supp. 2d \_\_, 2010 WL  
 22 174159 (EDNY Jan. 14, 2010).<sup>4</sup>

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24       <sup>4</sup> This case concerns claims of unauthorized re-use by defendant (it its website page  
 25 advertising products) of plaintiff's "copyrighted images" which plaintiff used for similar

1 Both of Defendant's cases on this subject also were decided on the facts.  
 2 *Entertainment Research v. Genesis*, 122 F. 3d 1211 (9<sup>th</sup> Cir. 1997) resolved the question  
 3 of copyrightability of 3 dimensional cartoon costumes on summary judgment and  
 4 *Russell v. Price*, 612 F. 2d 1123 (9<sup>th</sup> Cir. 1980) confirmed the copyright of a play (being  
 5 infringed by a derived movie) by judgment after hearing on the facts.

6                   ***3.1.2 No reason to predict success on the merits***

7                   *Presumption of legitimacy from registration.* Defendant recognizes, but then  
 8 ignores, the existence of a copyright registration for the entirety of Mr. Mackie's work.  
 9 That presumes the propriety of Mackie's copyright. 17 USC § 410 (c).

10                  *Creativity requirement is very modest.* The requisite amount of creativity is very  
 11 slight. *Feist v. Rural Telephone Service*, 499 U.S. 340, 345 (1991). It predictably is  
 12 satisfied even by mere collections of data<sup>5</sup> and is not judged by the relative simplicity of  
 13 lines (assuming that is what Defendant criticizes here). *Feist* re-states a long-standing  
 14 rule; the copyright protection of posters of realistically depicting circus performers were  
 15 upheld against attacks on grounds of lack of artistic merit and sophistication. *See,*  
 16 *Bleistein v. Donaldson Lithographing*, 188 U.S. 239 (1903). The Ninth Circuit Court  
 17 used the same concept to uphold the copyright of advertising photographs of a vodka  
 18 bottle in *ETS-Hokin v. Skyy Spirits*, 225 F. 3d 1068 (9<sup>th</sup> Cir. 2000). (We note that

20 \_\_\_\_\_  
 21 purpose in its own website. On the question of creativity of the senior use, which defendant  
 22 challenged, the Court said: "typically, when the originality of a copyrighted work is at issue, it  
 23 becomes a question of fact for a jury to resolve . . . [or, at the least] "on a motion for summary  
 judgment after the parties have conducted discovery and had the opportunity to submit evidence  
 on the issue." [internal quotes and citations deleted].

24                  <sup>5</sup>The collection of data at issue in *Feist*—a rural telephone directory—did not qualify  
 25 because the Court found that the method of organizing the data (mere alphabetical ordering)  
 was too simple.

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1 Defendant's own claim to copyright of his photo (based on Mackie's work) consists  
 2 simply of his use of a fish-eye camera lense and inclusion of a dancing slipper. (Motion  
 3 2/18 - 3/2).

4 As to the notion that there is no creativity in the original because it itself is a  
 5 copy, Defendant's own authority (*Entertainment Research* at 1218) says (naturally) that  
 6 it is his obligation to produce the supposedly original graphic of dancing feet.  
 7 Defendant is profoundly silent on exactly what that original image was and his  
 8 presumption on this score deserves no consideration.

9       *Deconstruction analysis inappropriate.*

10      Here and elsewhere in the motion Defendant employs an analytical method  
 11 marked by deconstruction of the original into its component parts—and then to claim that  
 12 they are both simple (curved arrows, for example) and insufficiently qualified for  
 13 copyright protection. *See Motion 8, 9 & 11.*

14      Any comparison so dependent upon the isolated parts of the original is  
 15 fallacious; it is the collection of elements which is important:

16      The proposition that standard or common features are not protected is  
 17 inconsistent with copyright law. To merit protection . . . a work need not  
 18 be particularly novel or unusual it need only have been independently  
 created.

19      *Mattel v. Goldberger Doll Mfg. Co.*, 365 F. 3d 133 (2<sup>nd</sup> Cir. 2004) (collection of  
 20 common doll elements, e.g., full faces, pert noses, bow lips, wide eyes and slim figures  
 21 can be protected by copyright). Some of Defendant's cases are in accord. *See, Sativa v.*  
*22 Lowry*, 323 F. 3d 805, 811 (9<sup>th</sup> Cir. 2003)(using the analogy to music notes (where each  
 23 note is not protected but collections assembled in tunes are); *Three Boys Music v. Bolton*

1 at 485.<sup>6</sup> *See also, Krofft v. McDonald's* at 1165 (analytic approach to emphasize all  
 2 dissimilarities inappropriate in intrinsic test of substantial similarity which relies upon  
 3 common impressions); *accord Aliotti v. Dankin*, 831 F. 2d 898, 901 (9<sup>th</sup> Cir. 1987).

4 Defendant's analysis also is made defective by his more than occasional  
 5 dismissal of elements as simple based only on his guess about their provenance.<sup>7</sup>

6 Defendant relies on *Apple Computer v. Microsoft*, 35 F. 3d 1435 (9<sup>th</sup> Cir. 1994)  
 7 as authority for not only deconstruction but also eliminating those deemed unprotectable  
 8 in the later comparison of the original to the copy. Motion 6/16. That case does so  
 9 provide, but only in the unique circumstance that some of the allegedly similarities owe  
 10 to earlier licenses between the plaintiff and defendant.

11 Equally improper is Defendant's evident argument, *see* Motion 2, which (relying  
 12 on undocumented facts—also a problem) emphasizes how many parts of Mr. Mackie's  
 13 work do *not* appear in Defendant's photo. *Sheldon v. Metro-Goldwyn Pictures*, 81 F. 2d  
 14 49, 56 (9<sup>th</sup> Cir. 1936) (“no plagiarist can excuse the wrong by showing how much of his  
 15 work he did not pirate.”)

16                   **3.2 Challenge to the copyrighability of the work as merely a procedure**

17                   Defendant also characterizes Mackie's embedded dance steps as a mere  
 18 procedure. (7/8; “copyright protection does not extend to any . . . procedure”).

19                   **3.2.1 No reason ever to predict success on the merits**

20  
 21  
 22                 <sup>6</sup> “It is well settled that a jury may find a combination of unprotectible elements to be  
 23 protectible under the extrinsic test because the over-all impact and effect indicate substantial  
 24 appropriation.” [citations deleted].

25                 <sup>7</sup> “Because the shoe parts appear to be mere castings of actual shoes, under *Feist* such  
 26 parts are copies of preexisting material and therefore are not protectable under copyright law . . .”  
 27 Motion 11/15 - 16.

1           Defendant first (wrongly) conflates Mackie's depiction of dancers with the dance  
2 itself. (He earlier conceded knowing the difference: at Motion 7/4 he said that  
3 Mackie's copyright was limited to the depiction but not the dance movement itself.)

4           Defendant then fails to provide any authority whatever (and we know of none)  
5 which equates "procedure" with any dance or dance "instruction" or "illustration" (both  
6 of which adjectives Defendant uses to describe Mackie's work. His only case on this  
7 subject is *Satava v. Lowry*, 323 F. 3d 805 (9<sup>th</sup> Cir. 2003) in which a commercial artist  
8 was unsuccessful at stopping others from making "glass-in-glass" sculptures because  
9 that is a (well established) fabrication technique.

10          Even if we were to underestimate Mackie's work as an instructional device for  
11 dancing lessons, those instructions themselves would be copyrightable. *Baker v.*  
12 *Selden*, 101 U.S. 99, 101-2 (1879) (copyright of text book inventing and describing  
13 double entry accounting is enforceable, but author is not thereby entitled to royalties for  
14 all who practice that accounting technique). Choreography (*i.e.*, live or video dance  
15 performances), although presumably more complete instructional guides to particular  
16 dances, are explicitly made copyrightable—since they too are depictions of dances. *See*  
17 17 USC § 102(a).

18          Inherent in the availability of other text descriptions and visual choreography  
19 presentations is the fact that there are many ways to depict any dance. Mackie's  
20 copyright, thus, cannot run afoul of the so-called "merger" doctrine which disallows  
21 copyright to a depiction which is synonymous with and necessary to describe an idea.  
22 *Ets-Hokin* at 1082.

23          Finally, we note the irony in Defendant's own claim to copyright, which is of  
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1 Mackie's work but likewise not intended to be dance instructions but rather an image of  
 2 "a person interacting with a portion of the public art sculpture apparently performing the  
 3 dance step depicted." (Motion 2/18)

4                   ***3.3 Challenge to the copyrightability of the work as merely a utilitarian***  
 5 ***thing***

6                   Defendant ends by branding Mackie's work as a utilitarian object, citing the  
 7 restriction on copyright for them. (9/14) (Separate designs on useful objects may be  
 8 protected by copyright, but not the useful article itself.) 17 USC § 101 (definition of  
 9 pictorial, graphic or sculptural work).

10                  Defendant once again is trying to force a factual decision in a 12 (b)(6) motion.  
 11 "Mere procedure" to do what? And, assuming arguendo that one could learn a dance  
 12 from the sculpture, that does not strip it of its copyrightability:

13  
 14                  **... the design of a statue portraying a dancer, created merely for its  
                          expressive form, continues to be copyrightable even when it has been  
                          included as the base of a lamp which is utilitarian. See *Mazer v. Stein*,  
                          347 U.S. 201, 205, 74 S.Ct. 460, 463, 98 L.Ed. 630 (1954). The objective  
                          in designing a chair is to create a utilitarian object, albeit an  
                          aesthetically pleasing one; the objective in creating a statue of a  
                          dancer is to express the idea of a dancer.** As the Act makes the  
 15 distinction, a useful article has as its function something more than  
 16 portraying its own appearance. See 17 U.S.C. § 101 (defining "useful  
 17 article").

18  
 19                  *Superior Form Builders, Inc. v. Dan Chase Taxidermy Supply Co.*, 74 F.3d 488, 493  
 20 (4th Cir. 1996). [Emphasis added; holding that taxidermist's sculpted forms of animals  
 21 were copyrightable.]

22  
 23                  ***3.3.1 Inappropriate for resolution under Rule 12(b)(6)***

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Defendant cites no authority the proposition that this issue can be resolved on the pleadings. His only case, *Entertainment Research*, required factual inquiry and a summary judgment before it could be decided whether all features of the costume at issue were necessary for its function as clothing (*i.e.*, to fit a human) and, thus, not subject to copyright.

### **3.3.2 No reason ever to predict success on the merits**

This restriction addresses only practical objects like tools, equipment and mechanical devices. *See Ets-Hopkin*, at 1080 (vodka bottle is just a functional thing without a distinctive shape, and so is not copyrightable). No authority cited or known equates “mechanical or utilitarian aspects” with artistic dance, dance instructions, dance depictions or anything of the like. That choreography is expressly included as a copyrightable thing should dispense with the prospect that dance could be a utilitarian object just as it should dispense with the prospect that dance steps are “procedures.”

### C. Conclusion

It cannot be that anyone reasonably believes that Mr. Mackie's position here to be specious. By Defendant's own standard, then, his motion must fail.

Dated this 1<sup>st</sup> day of February, 2010.

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